the trial, to clearly show that this court would not be warranted in disturbing the verdict of the jury, approved by the circuit court, and therefore said judgment is affirmed.

Affirmed.

ADAMS EXPRESS CO. *v.* GREEN.

Sept. 14, 1911.

[72 S. E. 102.]

1. Carriers (§ 158*)—Express Company—Limitation of Liability—Statutes.—Under Code 1904, § 1294c, subsec. 24, declaring that any carrier issuing its receipt shall be liable for loss or damage from its own negligence or the negligence of any connecting carrier, and that no receipt shall exempt it from the liability of a common carrier, the provision of an express company's receipt limiting its liability to a certain sum, unless a greater value was declared by the shipper, would furnish no defense to the shipper's action to recover the value of goods lost or injured.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 708, 709; Dec. Dig. § 158.*]

2. Carriers (§ 148*)—Limitation of Liability—What Law Governs.—Where the limitation of liability in the receipt of a common carrier is not contrary to a fixed public policy, the general rule in cases involving a conflict of laws in respect to contracts for carriage is that the carrier's liability is governed by the lex loci contractus, and not by the lex fori.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 650, 686; Dec. Dig. § 148.*]

3. Carriers (§ 148*)—Limitation of Liability—What Law Governs—Public Policy.—The provision of an express company's receipt, issued in the state of New York, on a shipment of goods to this state, that, in consideration of the rate charged, which was based upon a value not exceeding $50, unless a greater value was declared, the shipper agreed that the value of the goods was not more than that sum, and that the company would not be liable in any event for more than that sum, though valid in New York, is contrary to the public policy of this state, as declared by Code 1904, § 1294c, subsec. 24, which makes a common carrier liable for any loss or injury to goods caused by its neglect or that of a connecting carrier, and provides that no receipt shall exempt any common carrier from the liability which would exist in the absence of contract, and hence furnishes

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

no defense to an action in this state to recover the full value of the goods upon loss or injury.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 650, 686; Dec. Dig. § 148.*]

4. Carriers (§ 110*)—Loss or Injury to Goods—Shipper's Misrepresentation of Value—Defense.—Where a shipper misrepresents the character of a package for shipment, or misleads the carrier as to its value, he can, in case of loss, recover only its apparent value according to the representations made; and this is especially true where the representation was made in order to obtain a lower rate.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.*]

5. Carriers (§ 110*)—Loss or Injury to Goods—Defenses—Contracts in Violation of Interstate Commerce Act.—While the interstate commerce act (Act Feb. 4, 1887, c. 104, § 10, par. 3, 24 Stat. 382, as added by Act March 2, 1889, c. 382, § 2, 25 Stat. 858 [U. S. Comp. St. 1901, p. 3160]) prohibits a shipper from obtaining the transportation of property at less than the regular rates then established and in force, by fraudulent representations as to value, and makes such fraud a misdemeanor and imposes a penalty therefor, it does not prevent the shipper, on loss of the goods, from recovering their apparent value according to the fraudulent representations made, since, as the carrier's charges were based on that value, it is fair and just that it should be held liable for their loss upon the same basis of value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.*]

6. Carriers (§ 110*)—Knowledge or Concealment by Shipper—Neglect to State Value—Defense.—That an express company accorded shipments of the value of $50 and over a higher degree of care than shipments under that value; that, had it known the value of the shipment involved, it would have accorded it the unusual and extraordinary care that shipments of its value were accorded; that the shipper had knowledge that valuable shipments were handled with more care than shipments of ordinary value, and that the contract prepared by the company had a blank space containing the word "value," as a request to the shipper to value the shipment, and that by his failure to do so it was not informed of its value and was deprived of the opportunity of giving the shipment unusual care, do not amount to a case of fraudulent representation or concealment of the value of the shipment, and afford no defense to an action to recover its full value.

[Ed. Note.—For other cases, see Carriers, Cent. Dig. §§ 497-500, 503, 504; Dec. Dig. § 110.*]

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*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

Appeal from Law and Chancery Court of City of Roanoke.

Action by Mrs. K. W. Green against the Adams Express Company. Judgment for plaintiff, and the defendant appeals. Reversed and remanded.

Woods, Jackson & Smith and *Coxe & Cocke,* for plaintiff in error.

Moomaw & Moomaw and *D. Saylor Good,* for defendant in error.

BUCHANAN, J. This action was brought by the defendant in error to recover damages from the plaintiff in error for the loss of a package of jewelry, delivered to the latter in the state of New York, to be carried to the former at Roanoke, in the state of Virginia. The express company filed the plea of not guilty and offered five special pleas, which were objected to by the plaintiff and rejected by the court. The plea of the general issue was afterwards withdrawn, and upon proof of the value of the package of jewelry lost there was a judgment against the express company for $412.70. To that judgment this writ of error was awarded.

The ground of defense relied on in rejected special pleas Nos. 1 and 2 was that by the contract for shipment entered into when the package was received it was provided that, "In consideration of the rate charged for said property, which is regulated by the value thereof and is based upon the valuation of not exceeding fifty dollars unless a greater value is declared, the shipper agrees that the value of said property is not more than fifty dollars unless a greater value is stated herein, and that the company shall not be liable in any event for more than fifty dollars if no value is stated herein," and that such a contract limiting the liability of the express company, being valid in the state of New York where it was made, is valid in this state, and that since the value of the package was not stated in the contract there could be no greater recovery than $50, notwithstanding subsection 24 of section 1294c, of Pollard's Code.

That subsection contains the following provision: "Whenever any property is received by a common carrier to be transferred from one place to another, within or without this state, or when a railroad or other transportation company issues its receipt or bills of lading in this state, the common carrier, railroad or transportation company issuing such bill of lading shall be liable for any loss or damage or injury to such property caused by its negligence or the negligence of any common carrier, railroad or transportation company operating within any territory or state of the United States to which such property

may be delivered, or over whose lines such property may pass; and the fact of loss or damage in such case shall itself be prima facie evidence of negligence, and the common carrier, railroad or transportation company issuing such receipt or bill of lading shall be entitled to recover in a proper action the amount of any loss, damage, or injury it may be required to pay to the owner of such property from the common carrier, railroad or transportation company aforesaid through whose negligence the loss, damage, or injury may be sustained. No contract, receipt, rule, or regulation shall exempt any such common carrier, railroad or transportation company from the liability of a common carrier which would exist had no contract been made or entered into."

[1] If the contract for shipment had been entered into in this state, there can be no question that under the decisions of the court in Chesapeake & Ohio Ry. Co. *v.* Beasley, Couch & Co., 104 Va. 788, 52 S. E. 566, 3 L. R. A. (N. S.) 183, Same *v.* Pew, 109 Va. 288, 64 S. E. 35, and Southern Ex. Co. *v.* Keeler, 109 Va. 459, 64 S. E. 38, the provision limiting the liability of the express company would have furnished no defense to the right of the plaintiff to recover the full value of the property lost. The question, therefore, which we are called upon to determine is whether the law of the state of New York or the law of this state should govern in determining the liability of the express company.

[2] The general rule seems to be that in cases involving a conflict of laws in respect to contracts of affreightment, the carrier's liability is governed by the lex loci contractus, and not by the lex fori. Minor's Conflict of Laws, § 169; 1 Hutchinson on Carriers (3d Ed.) §§ 212 and 206; 6 Cyc. 411, 412, and cases cited. But a different rule prevails in the Supreme Court of the United States and in some of the state courts, where the limitation in the bill of lading is contrary to the fixed public policy of the United States or of the particular state. 1 Hutchinson on Carriers, § 214.

In the recent case of The Kensington, 183 U. S. 263, 22 Sup. Ct. 102, 46 L. Ed. 190, the contention was in effect, as stated by Mr. Justice White (now Chief Justice), that, "where a contract limiting the liability of a carrier against its own negligence is made in a foreign country, to be executed at least in part in the United States, the law of the foreign country, either by its own force or by virtue of the agreement of the contracting parties, must be enforced by the courts of the United States, even though to do so requires the violation of the public policy of the United States." In replying to that contention, the learned Justice said: To state the proposition is to answer it. It is true

as a general rule that the lexi loci governs, and it is also true that the intention of the parties to a contract will be sought out and enforced. But both these elementary principles are subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught. * * * Nor is the suggestion that because there is no statute expressly prohibiting such contracts, and it is assumed no offense against morality is committed in making them, therefore they should be enforced despite the settled rule of public policy to the contrary. The existence of the rule of public policy, and not the ultimate causes upon which it may depend, is the criterion."

[3] While the precise question involved in the case under consideration has never been passed upon by this court, the conclusion was reached, in the case of National Car Co. *v.* Louisville & Nashville R. Co., 110 Va. 413, 66 S. E. 88, 24 L. R. A. (N. S.) 1010, that a contract with a common carrier, made in another state, valid there, but to be partly performed in this state, would not be enforced by its courts when in violation of the public policy of this state, as shown by its statutes. In that case the contract whose validity was involved was made in the state of Kentucky, by which the common carrier gave to one person the exclusive right to place advertisements on its box cars; a part of its line of road being in this state. That contract, whether valid or invalid in the state of Kentucky, where made, it was held would not be enforced in the courts of this state, because it gave to one person an undue and unreasonable preference and advantage over others, in violation of the public policy of this state, as shown by subsection 3, § 1294c, Va. Code 1904.

The principle involved in that case and the one under consideration seem to be substantially the same. Both were contracts made in another state, and valid, or conceded to be valid, where made. The provisions of both were to be executed or performed in part in this state. The provisions in each were in violation of the public policy of this state, as shown by its statutes.

The decisions in the Chesapeake & Ohio Ry. Co. *v.* Beasley, Couch, etc., supra, and the cases which follow it, are based upon the view that a contract with a common carrier, limiting its liability to a sum less than the actual value of the article shipped, in consideration of a reduced rate, was in effect exempting the carrier, pro tanto, from its own negligence or misconduct. It is clearly as much against the fixed policy of this state to permit a common carrier to exempt itself from liability for its own negligence, as it is to allow it to give one person an undue and unreasonable preference and advantage over others.

The court is of opinion that the trial court properly rejected special pleas numbered 1 and 2.

Pleas numbered 3 and 4 aver a state of facts which, if true, show that the consignors of the package of jewelry knew that the value of the goods shipped regulated the rate of charges for carriage, and that they fraudulently, by their acts and conduct, represented that the package of jewelry delivered to the defendant company for shipment did not exceed the value of $50, and thereby obtained a lower rate of charge, when in fact they knew that the jewelry was worth $412.50, the amount now sought to be recovered as damages for its loss.

Although the courts of this state will not enforce a contract like that relied on in special pleas numbered 1 and 2, because it is in violation of the public policy of the state as declared by statute, yet, if the shipper through fraudulent representations, verbal or otherwise, conceals the true value of the article shipped, there is no reason why he should not, as in other cases, suffer the consequences of his own fraud.

[4] It seems to be established in England and in this country by the weight of authority, and by the better reason, that where the shipper misrepresents the character of a package for shipment, or misleads the carrier as to its value, he can in case of loss only recover its apparent value according to the representations made; and especially is this true where the representation was made in order to obtain a lower rate of charges. See 1 Hutchinson on Carriers, §§ 328-332; 6 Cyc. 380; 5 Am. & Eng. Ency. L. (2d Ed.) 345; note to Bottum *v.* Charleston, etc., Ry. Co., 5 Am. & Eng. Ann. Cas. 118, 120-122, where a large number of cases, English and American, are cited.

Such a rule is fair and just to both parties. It would be not only unreasonable, but wrong, for a shipper by his fraudulent representations to have his goods carried for a compensation based upon a valuation much less than their actual value, and then in case of loss to recover their full value from the carrier. To so hold would permit the shipper to take advantage of his own wrong.

[5] The trial court, we think, erred in rejecting special plea numbered 4, but properly rejected special plea numbered 3, because that plea denied the plaintiff's right to recover anything. While paragraph 3, § 10, of the interstate commerce act (Act Feb. 4, 1887, c. 104, 24 Stat. 382, as added by Act March 2, 1889, c. 382, § 2, 25 Stat. 858, 3 Fed. St. Ann. 835 [U. S. Comp. St. 1901, p. 3160]), relied on in that plea, prohibits a shipper from obtaining the transportation of property at less than the regular rates then established and in force by fraudulent representations as to the value, and make such fraud a misdemeanor and imposes a penalty therefor, it ought not, we think, to pre-

vent the shipper from recovering, if the goods are lost, their apparent value according to the fraudulent representations made. The carrier's charges were based upon that value, and, if the goods were lost by a failure of duty on its part, it is reasonable and just that it should be held liable for their loss upon the same basis of value.

[6] Special plea No. 5, as construed by the defendant company in its petition for this writ of error, sets up in substance the following facts:

"(1) That the express company accorded shipments of the value of fifty dollars and over a higher degree of care than was accorded shipments of the value of under fifty dollars; that it accorded shipments of the value of fifty dollars and over unusual and extraordinary care, whereas it accorded shipments under the value of fifty dollars due care only.

"(2) That, had the carrier known the value of the shipment in question, it would have accorded it the unusual and extraordinary care that shipments of its value are accorded, and it would have been handled in a very different manner from the average run of shipments.

"(3) That, by reason of the shipper's failure to state the value in the contract prepared by the shipper, the carrier was not informed as to the nature and value of the shipment, and was deprived of the opportunity of giving it the unusual and extraordinary care that it would have given.

"(4) That the shipper had been in the habit of filing out the shipping contracts himself, and, being an extensive shipper over the express company, had knowledge of the fact that valuable shipments were handled with more care than shipments of ordinary value. That, in addition to this, the said shipping contract referred to contained in it a blank space above which was written the word 'value.' That this blank space left for the value was not only a request on the part of the defendant to the shipper to insert the value, in order that it might charge a rate commensurate with the risk that it was taking, but was a request for information, in order that it might give the package the care that a shipment of its value would have been given. That, therefore, no recovery over and above fifty dollars should be allowed, for the reason that the carrier was deprived of the opportunity of giving the shipment the care that a package of greater value than fifty dollars would have been given."

The facts averred do not, in our opinion, make out a case of fraudulent representation or concealment of the value of the goods on the part of the shipper, or a refusal on his part to give their value when requested. Mere knowledge on the part of the shipper of the different degrees of care which the carrier is in the habit of exercising according to the value of the

goods intrusted to it for transportation cannot change the degree of care imposed upon it by law, or place upon the shipper any higher duty than if he was ignorant of such habit or custom. It would be a dangerous doctrine to hold that the degree of care required of a common carrier was to be measured by the value of the goods shipped. We do not think that such a rule has been or ought to be established.

The court is of opinion that the trial court erred in rejecting special plea No. 4, and for that error its judgment must be reversed, and the cause remanded for further proceedings to be had not in conflict with the views expressed in this opinion.

Reversed.

Note.

While this case reaffirms the construction placed upon subsec. 24 of § 1294c in the case of Chesapeake, etc., R. Co. *v.* Pew, 109 Va. 288, 64 S. E. 35, 15 Va. Law Reg. 139, and Southern Express Co. *v.* Keeler, 109 Va. 459, 64 S. E. 38, 15 Va. Law Reg. 148, namely, that it makes void any contract by which a common carrier seeks to limit, in any way, its common-law liability as insurer, as by a term of the bill of lading limiting its liability to $50, unless a greater value be declared and stated therein, yet it gives a crumb of comfort to the carrier by intimating that a "refusal on his (the shipper's) part to give their value (that of the goods) when requested" would bar a recovery by him for a greater amount than fifty dollars, when the loss is not due to the carrier's negligence. Still the court holds that the mere making out of a bill of lading by the shipper, without filling out the blank space left for the value, is not a refusal on his part to give their value when requested, even as it held in Southern Express Co. *v.* Keeler, that fraud *cannot be predicated* of a mere acquiescent acceptance by the shipper of a bill of lading prepared by the carrier with the customary stamp "value asked and not given." The holding here is probably the logical result of that in Chesapeake, etc., R. Co. *v.* Pew and Southern Express Co. *v.* Keeler, supra, if those cases were to be followed, as we hoped they would not be when the question arose again as here. We see no reason to change our opinion that those cases introduced a new rule by a forced and unnecessary construction of a section relating in all its other terms to initial and connecting carriers alone. It is useless to repeat the argument there made, for which see annotation to the Pew case, 15 Va. Law Reg., p. 145. We see no reason to change the sentiments there expressed, after a careful reperusal thereof, and a close reading of the principle case. The new rule goes no further back than the Pew case, as C. & O. Ry. Co. *v.* Beasley, 104 Va. 788, although cited by the court as supporting it, clearly only applies to contracts exempting or limiting liability for *negligence* which has never, even at common law, been limitable by contract, and not to the insurer liability, which has always been limitable by special contract, when a statute does not forbid.

We ask again that some reader of a nice judicial preception take up this question and show us wherein the position taken in the above note is incorrect in its reasoning, although the law of Virginia now seems settled the other way.

J. F. M.